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No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1930

MAAS & WALDSTEIN COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 25) is reported in 37 F. (2d) 196.

JURISDICTION

The judgment sought to be reviewed was entered on December 9, 1929. (R. 30.) A motion for a new trial was overruled on April 7, 1930. (R. 31.) The petition for certiorari was filed on July 7, 1930. (R. 31.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled to interest on a refund of excess profits taxes for 1917 on the ground that its request for special assessment was either "a specific protest" or a "claim for refund" within the meaning of Section 1324 (a) of the Revenue Act of 1921.

STATUTE AND REGULATIONS INVOLVED

Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316, provides:

> SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

Article 265 of Regulations 33, revised, promulgated January 2, 1918, under the Revenue Act of 1917, provides in part as follows:

> ART. 265. Claims for the refunding of assessed taxes and penalties must be made out upon Form 46. In this case, as in that of claims for abatement upon Form 47, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should be still further supported by an affidavit of the deputy collector of the proper division, and by the certificate of the collector, showing the list, page and line upon which the assessment appears, the amount of the tax, and the date of payment thereof.

STATEMENT

On March 28, 1918, the petitioner filed its income and excess-profits tax return for the year 1917. (R. 20.) Attached to the return was a request for special assessment under the applicable provisions of the Revenue Act of 1917. (R. 21.) This request was renewed by letter to the Collector on June 14, 1918. (R. 21.) On June 20, 1918, the taxes for 1917 were paid. (R. 20.) On December 30, 1921, the petitioner filed a claim for refund of a part of these taxes. (R. 21.) On April 15, 1922, the Commissioner approved a schedule of overassessments embracing an overpayment in favor of the petitioner of $462,038.34 (R. 22), thus granting the taxpayer's request for a special assessment.

This sum was paid to the petitioner without interest. (R. 24.) This suit was brought to recover interest on the amount so refunded.

ARGUMENT

The petitioner contends that under Section 1324 (a) of the Revenue Act of 1921 it is entitled to interest on its overpayment of 1917 taxes. It urges first that its 1917 income and profits taxes were paid under "a specific protest" so that it should receive interest from June 20, 1918, the date of payment, to May 9, 1922, the date of the allowance of the refund. It urges in the second place that, even if the payment was not made under specific protest, nevertheless the letter of June 14, 1918, was a "claim for refund" so that it should receive interest from six months after June 14, 1918, to May 9, 1922.

We submit that the tax was not paid under protest.

As a prerequisite to the recovery of interest upon the allowance of a claim for refund, Congress has required that the taxpayer shall have paid the tax "under a specific protest setting forth in detail the basis of and reasons for such protest." "Protest," as used in Section 1324 of the Revenue Act of 1921, means an objection to the validity and legality of an assessment or collection. In *Girard Trust Co. v. United States*, 270 U. S. 163, 172–173, the provision of Section 1324 was considered by this Court

to have been "intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes. * * * A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once." In that case the taxpayer's statement used the word "protest" but did not accord with the statutory requirement of giving specific reasons for the alleged illegality of the collection, and this Court refused to allow any recovery of interest on the amount refunded.

The three letters written by the petitioner (R. 7, 8, 10) do not object to paying the tax assessed. The third letter, dated June 14, 1918, characterizes the second letter as "A request * * * for assessment" under Article 52 of Regulations 41. The letters merely request a hearing on a matter entirely within the Commissioner's discretion, on the ground that unless special assessment is given, it would be unfairly but legally bound to pay taxes disproportionate to the taxes of other companies in the same line of business. There was no objection that the assessment or collection of the tax was illegal. There was an expressed dissatisfaction at the assessment under Section 201, but no protest against paying the tax so assessed.

We submit that no "claim for refund" was made by the petitioner before that of December 30, 1921.

A request for special assessment is not a claim for refund. *Stauffer, Eshleman & Co., Ltd.*, v. *United States*, 66 C. Cls. 277. Had the petitioner's letters been sworn to and had they contained all that must be in a claim for refund, it is possible that the requirement of Article 265 of Regulations 33 (p. 3, *supra*) that such claims "must be made out upon Form 46" could be overlooked. *Lasher* v. *United States*, 65 C. Cls. 295. But these letters were not even sworn to, although Article 265 of Regulations 33 specifically requires that "All the facts relied upon in support of the claim should be clearly set forth under oath." The importance of complying with such a requirement was pointed out by this Court in *Lucas, Commissioner*, v. *Pilliod Lumber Company*, 281 U. S. 245. Moreover, the letters were written before the payment of the tax. A claim for refund can not be filed until after the taxes have been paid. *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205. The taxpayer made no effort to comply with the regulations in force at the time the letters were written. Its request for special assessment has none of the characteristics of the claim for refund contemplated by the statutes and regulations.

We deem it unnecessary to consider the various subsidiary points raised in the petitioner's brief which criticize the language of the opinion below. The reasoning of the Court as to these points does not seem clear and we do not support it, but the result, we submit, is correct.

CONCLUSION

The judgment of the court below is correct. There are no decisions in conflict with it. It is consistent with the most applicable decision of this Court. The petition should be dismissed.

Respectfully submitted.

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